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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
STAPLES, INC and	)	CG Docket No. 02-278
QUICK LINK INFORMATION	)	
SERVICES, LLC	)	
	)	
Petition for Expedited	)	
Declaratory Ruling and for a	)	
Cease and Desist Order	)	

To: The Commission

PETITION FOR EXPEDITED DECLARATORY RULING AND FOR A CEASE AND DESIST ORDER

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May 3, 2004

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PETITION FOR EXPEDITED DECLARATORY RULING AND FOR A CEASE AND DESIST ORDER

STAPLES, INC. ("Staples") and QUICK LINK INFORMATION SERVICES, LLC ("Quick Link") (Staples and Quick Link collectively, the "Petitioners"), pursuant to Section 554(e) of the Administrative Procedure Act, 5 U.S.C § 554(e), and Section 1.2 of the Commission's Rules, 47 C F.R. § 1.2, respectfully request the Commission to issue, on an expedited basis, a declaratory ruling:

(1) that challenges to the validity of Commission rules and orders lie not in state court but in federal Courts of Appeals and that Mattison R. Verdery, C.P A., P.C. ("Verdery"), by challenging the validity of Commission rules and orders in the Superior Court of Richmond County, Georgia, has failed to comply with the Communications Act of 1934, as amended, 47 U.S.C. §§ 151 *et seq.* (the "Communications Act"), and with the Hobbs Act, 28 U.S.C. § 2342(1);

(2) that the facsimile transmission of an advertisement from a sender to a recipient with whom the sender has an established business relationship does not violate the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 (the "TCPA"), or the Commission's rules and orders implementing the TCPA in effect as of March 18, 2003; and

(3) that Petitioners' facsimile transmission of an advertisement on March 18, 2003 to Verdery did not violate the TCPA or the Commission's rule and orders implementing the TCPA in effect on March 18, 2003.

In addition, Petitioners, pursuant to Section 312(b) of the Communications Act, 47 U S.C. § 312(b), request the prompt issuance of a cease and desist order enjoining further prosecution by Verdery of its Georgia state court suit against Petitioners.

I. INTRODUCTION AND SUMMARY

The Commission made clear more than eleven years ago that businesses may lawfully transmit facsimile advertisements to persons and entities with whom they have an established relationship. Directly contrary to statutory provisions governing the filing of challenges to the validity of Commission rules and orders, Verdery, which has admitted it was at all relevant times an established customer of Staples, brought such challenges in a suit in the Superior Court of Richmond County, Georgia, seeking billions of dollars in class action damages from Petitioners, based on Verdery's allegation that it received an unsolicited facsimile advertising Staples office products in March 2003

Despite Petitioners' best efforts to alert the Georgia trial court to this Commission's power to issue orders under the Communications Act and to the fact that state courts lack subject matter jurisdiction over challenges to the validity of Commission rules and orders, the trial court has steadfastly refused not only to dismiss the case but also to grant avenues

for appeal to the Georgia appellate courts. The effect of the trial court's inaction is to require that Petitioners suffer full-blown "class discovery" and have a multi-billion-dollar judgment entered against them, notwithstanding their compliance with TCPA requirements, before being entitled to further review. The Petitioners' employees, shareholders and investors should not be subjected to such an enormous judgment given that the Petitioners' actions violated no Commission rule or order.

Petitioners request that the Commission rule that challenges to the validity of Commission rules and orders may not be brought in state court, but rather must be brought in the federal Courts of Appeals. Petitioners further request that the Commission simply reaffirm, as applied to Verdery, what it has repeatedly stated – namely, that prior to the effective date of the Commission's newly revised TCPA rules, "companies that transmitted facsimile advertisements to customers with whom they had established business relationships were in compliance with the Commission's existing rules,"[1] and that until the Commission's revised TCPA rules become effective on January 1, 2005, "an established business relationship will continue to be sufficient to show that an individual or business has given express permission to receive facsimile advertisements [2] Petitioners also request a ruling that they did not violate the TCPA or the Commission's rules and orders implementing the TCPA in effect as of March 18, 2003.

Petitioners seek the requested relief in order to remove uncertainty and to terminate controversy between Verdery and Petitioners with respect to the matters that are the subject

[1] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, *Report and Order*, FCC 03-153, n 699 (rel July 3, 2003)

[2] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No 02-278, *Order on Reconsideration*, 18 FCC Rcd 16972, 16975, n 24 (2003)

hereof. The requested rulings will make clear that suits brought to collaterally challenge the validity of the Commission's TCPA rulings are not permitted.

Action on this Petition is requested by May 10, 2004, the date on which Verdery's counsel will commence "class discovery" from Petitioners in Verdery's blatant attempt to circumvent and nullify this Commission's orders.

II. BACKGROUND

A. The TCPA

The Telephone Consumer Protection Act of 1991, codified at 47 U.S.C. § 227, enacted December 20, 1991, provides, in relevant part.

> It shall be unlawful for any person within the United States...
>
> .. (C) to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine....

47 U.S.C. § 227(b)(1)(C).

The TCPA defines "unsolicited advertisement" as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission." 47 U.S.C. § 227(a)(4).

The TCPA began as two separate bills, one concerning telemarketing through the use of autodialing systems and one concerning facsimile advertising. *See* H.R. 101-628 (January 24, 1989) ("Restrictions on the Use of Telephone Autodialing Systems"); H.R. 101-2131 (April 26, 1989) ("Automated Telephone Solicitation Protection Act of 1989"); H.R. 101-2184 (May 2, 1989) ("Facsimile Advertising Regulation Act") The original bill containing

telemarketing restrictions included an explicit business relationship exception. *Ibid.* The original bill containing facsimile advertising restrictions did not. *Ibid.*

Restrictions on telemarketing and facsimile advertising were merged into one bill in July 1989, in House Resolution 2921. Included in this bill, the "Telephone Advertising Regulation Act," were restrictions on autodialing, prerecorded voice messages and facsimile advertising H.R. 101-2921

The Act underwent various revisions in Committee and before Congress. The Senate version, S. 1410, as it was introduced on the Senate floor, contained no exception for an established business relationship in the context of telephone or facsimile advertising. Congressional Record, November 7, 1991, S. 16200 to S. 16203. Despite there being absolutely no reference in the bill to an established business relationship exception, the sponsors of the bill stated that the bill would not prohibit businesses from contacting their existing customers:

> [MR. PRESSLER]· This bill will not prohibit businesses from contacting their established customers.... We have directed the FCC to further define the rules and regulation[s] needed to allow businesses to contact customers who expected to receive calls from companies they do business with. The purpose of the substitute [bill] is to prohibit cold calls by any telemarketer to the telephone of a consumer who has no connection or affiliation with that business and who has affirmatively taken action to prevent such calls.

Congressional Record, November 7, 1991, S. 16202

Senator Gore of Tennessee noted that earlier drafts of the telephone portion of the bill included an explicit exception for established business relationships. Congressional Record, November 7, 1992, S. 16204. Senator Gore requested and received clarification from the bill's sponsors that, even though the bill did not contain any reference to established business

relationships, the FCC would have the authority to "make different rules concerning calls made by businesses to their prior or existing customers":

> [MR. GORE]: Is it not true that the committee deleted the established business relationship exception from the bill because it did not want to become involved in the technicalities of determining what this phrase means? Nevertheless, is it not true that the FCC may consider establishing different rules concerning calls made by businesses to their prior or existing customers?
>
> [MR. PRESSLER]. Yes, that is correct.

The House Committee in which the bill originated, the House Energy and Commerce Committee, stated explicit findings regarding the definition of "telephone solicitation," but stated no findings with regard to the definition of "unsolicited advertisement" and shed no light on the terms "express," invitation," and "permission." 47 U.S.C. § 227 (Congressional findings). It was not unaware that the statute's failure to define these terms resulted in statutory ambiguity. In hearings on the proposed facsimile advertising restrictions, the Committee was presented with materials describing this quandary. *See* Telemarketing Practices, Hearing Before the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce, Serial No. 101-43, May 24, 1989, at p. 63. Professor Robert L. Ellis of the Indiana University School of Law highlighted the issue as follows:

> One of the core phrases used by H.R. 2184 is "unsolicited advertisement," which is defined as "any material advertising the commercial availability of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission" This definition is problematic for several reasons. First, it begs the question of what "unsolicited" means. When, for example, does a prior business contact constitute "express invitation or permission"?

Id Rather than clarify these terms, the Committee noted that it purposely did not define the words "express invitation or permission":

> The Committee did not attempt to define precisely the form in which express permission or invitation must be given, but did not see a compelling need for such consent to be in written form.

House Report 102-317, at p. 13. The Committee did make clear, however, that it did not intend to unduly interfere with established business relationships:

> The bill reflects ... a desire to not unduly interfere with ongoing business relationships
> * * *
> The Committee does not intend for [the telemarketing] restriction to be a barrier to the normal, expected or desired communications between businesses and their customers.

Id

On a related note, in discussing the definition of "telephone solicitation," the House Committee noted that there was no explicit exception for circumstances where the consumer gave a number to the caller. However, the Committee stated that where a consumer gives a number to a caller, the term "telephone solicitation" would not apply.

> The term does not apply to calls or messages where the called party has in essence requested the contact by providing the caller with their telephone number for use in normal business communications.

House Report No. 102-317, at p. 13

As enacted, the TCPA established a broad role for the Commission to administer the statute. Section 227(b)(2) of the TCPA states: "Regulations; Exemptions and Other Provisions. The Commission shall prescribe regulations to implement the requirements of this subsection...." 47 U.S.C. § 227(b)(2). *See also* 47 U.S.C. § 227, "Other Provisions," following the Congressional findings (quoting October 28, 1992, Public Law 102-556, Title I, § 102, 106 Stat. 4186). President George H.W. Bush signed the bill into law because it

gave the FCC "ample authority to preserve legitimate business practices." Statement by the President upon signing the TCPA into law, December 20, 1991.

In sum, there is essentially no legislative history on the meaning of the terms "unsolicited advertisement" and "prior express invitation or permission" in the TCPA. There are no specific Congressional findings regarding the regulation of facsimile advertising. Congress thus left the definition of these terms and the regulation of facsimile advertising largely to the Commission's discretion, to be exercised against a backdrop in which the sponsors of the TCPA repeatedly expressed their intention that the statute "not unduly interfere with ongoing business relationships "

B. The Commission's Implementation of the TCPA

In an order released October 18, 1992, the Commission adopted rules implementing the TCPA. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* CC Docket No 92-90, *Report and Order*, 7 FCC Rcd 8752, (1992) (the "*1992 TCPA Order*"). Regarding facsimile advertisements, the pertinent rule stated: "No person may ... [u]se a telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine." 47 C.F R. § 1.1200(b)(3). The rules codified a definition of "unsolicited advertisement" that is identical to the definition in the TCPA. *See* 47 C F R. § 1.1200(f)(5) (1991).

In the *1992 TCPA Order*, the Commission stated that the sending of facsimile advertisements to a person with whom the sender has an established business relationship could be deemed "invited or permitted" and thus not "unsolicited":

> In banning telephone facsimile advertisements, the TCPA leaves the Commission without discretion to create exemptions from or limit the effects of the prohibition (see § 227(b)(1)(C)); thus, such transmissions are banned in our rules as they are in the TCPA. §

> 64.1200(a)(3) We note, however, that facsimile transmission from persons or entities who have an established business relationship with the recipient can be deemed to be invited or permitted by the recipient. See para. 34, supra.

7 FCC Rcd at 8779, n.87. In paragraph 34 of the *1992 TCPA Order*, the Commission elaborated further:

> We conclude, based upon the comments and the legislative history, that a solicitation to someone with whom a prior business relationship exists does not adversely affect subscriber privacy interests. Moreover, such a solicitation can be deemed to be invited or permitted by a subscriber in light of the business relationship. Additionally, the legislative history indicates that the TCPA does not intend to unduly interfere with ongoing business relationships.

Id. at 8779, ¶ 34.

In an order released August 7, 1995, the Commission reiterated that an established business relationship supplied the necessary consent for receipt of facsimile advertisements:

> The [*1992 TCPA Order*] makes clear that the existence of an established business relationship establishes consent to receive telephone facsimile advertisement transmissions.

Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CC Docket No. 92-90, *Memorandum Opinion and Order*, 10 FCC Rcd 12391, 12408 ¶ 37 (1995) (the "*1995 TCPA Order*").

In the ensuing years, the Commission issued less formal, but equally unequivocal, statements that businesses were permitted to send facsimile advertisements to their established customers *See, e g.,* "Unwanted Faxes· What You Can Do" (June 6, 2003) ("If, however, you have an 'established business relationship' with a person or entity then, in effect, you've given your consent to receive unsolicited faxes from that person or entity."); Public Notice, "FCC Reminds Consumers About 'Junk Fax' Prohibition" (February 20,

2001) ("An established business relationship, however, demonstrates consent to receive fax advertisement transmissions.").

On June 26, 2003, the Commission, after receiving public comments on proposed changes to its TCPA rules, adopted a new rule, requiring, for the first time, written permission to send facsimile advertisements, and eliminating an established business relationship as a basis for showing that the recipient of a facsimile advertisement had given its permission to receive such a facsimile:

> As of the effective date of these rules, the EBR will no longer be sufficient to show that an individual or business has given their express permission to receive unsolicited facsimile advertisements. * * *
>
> Under the new rules, the permission to send fax advertisements must be provided in writing [and] include the recipient's signature and facsimile number....

Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No 02-278, *Report and Order*, FCC 03-153, ¶¶ 189, 191 (rel. July 3, 2003) (the "*2003 TCPA Order*"). At the same time, the *2003 TCPA Order* left no doubt that entities that had acted in reliance on the Commission's previous orders and rules regarding facsimile advertising committed no violation of the TCPA and its implementing rules:

> We emphasize that, prior to the effectuation of rules contained herein, companies that transmitted facsimile advertisements to customers with whom they had established business relationships were in compliance with the Commission's existing rules.

Id at n.699.

On August 18, 2003, the date the new rule was to become effective, the Commission, in response to numerous petitions and comments regarding the scope and effects of the new

rules, delayed the effective date of the signed-writing requirement until January 1, 2005[3] and reaffirmed that in the interim, its long-standing conclusion regarding established business relationships would remain in effect:

> We emphasize that our existing TCPA rules prohibiting the transmission of unsolicited advertisements to a telephone facsimile machine will remain in effect during the pendency of this extension. Under these rules, those transmitting facsimile advertisements must have an established business relationship or prior express permission from the facsimile recipient to comply with our rules. ..
> * * *
> Therefore, until the amended rule at 47 C.F.R. § 64.1200(a)(3)(i) becomes effective on January 1, 2005, an established business relationship will continue to be sufficient to show that an individual or business has given express permission to receive facsimile advertisements

2003 TCPA Order on Reconsideration, 18 FCC Rcd at 16975, n.24 & ¶ 6.[4] See also FCC News Release (August 19, 2003) (same).

On October 3, 2003, the Commission stayed, for an interim period, limitations in its revised TCPA rules on the duration of an "established business relationship" as it applies to the sending of facsimile advertisements *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, *Order*, FCC 03-230 (rel. October 3, 2003). The Commission stated that during this interim period, "the established business relationship, as applied to unsolicited facsimile advertisements, will not expire after 18 months of the recipient's last purchase or transaction or three months after the last

[3] "IT IS ORDERED, that the effective date for the Commission's determination that an established business relationship will no longer be sufficient to show that an individual or business has given express permission to receive unsolicited facsimile advertisements and the requirement that the sender of a facsimile advertisement first obtain the recipient's express permission in writing, IS January 1, 2005 " *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No 02-278, *Order on Reconsideration*, 18 FCC Rcd 16972 (2003) (the "*2003 TCPA Order on Reconsideration*").

[4] Currently pending before the Commission are petitions for reconsideration asking the Commission to retain the established business relationship defense or to adopt methods other than a signed written statement to demonstrate prior express consent to receive facsimile advertising *See* CG Docket No 02-278

application or inquiry." *Id*., ¶ 4. The Commission yet again "emphasize[d] that nothing in this Order impacts our conclusion in the *Order on Reconsideration* that an established business relationship constitutes sufficient permission to send a facsimile advertisement until January 1, 2005." *Id.*

In sum, for more than 11 years the Commission has interpreted the TCPA to allow businesses to send facsimile advertisements to their established customers. Moreover, although Congress has on two occasions since the Commission adopted its *1992 TCPA Order* revisited the TCPA,[5] Congress never has reversed or revised the Commission's facsimile advertising rules and orders.

C. The Relationship Between Staples and Verdery

Petitioner Staples is a national retailer of office supplies, business services, furniture, and technology having its principal place of business in Framingham, Massachusetts. Staples is a publicly traded company employing approximately 40,000 persons nationwide. Petitioner Quick Link is a relatively small, privately owned information services company based in Branford, Connecticut whose services include facsimile advertising. Quick Link has approximately six persons employed in operations.

Verdery is an accounting firm based in Augusta, Georgia.

On March 18, 2003, Verdery was sent a facsimile advertisement by Quick Link on behalf of Staples advertising the commercial availability of Staples products (the "Facsimile"

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[5] On October 28, 1992, Congress added subsection (c) to section 227(b)(2), expanding the FCC's authority to exempt certain calls to cellular telephones from the prohibitions of the TCPA Congress did not restrict the authority the Commission had already exercised with regard to facsimile advertising *See* 47 U.S.C. § 227 (History, Ancillary Laws and Directives Amendments, October 28, 1992) Congress again revisited the TCPA in March 2003, in enacting the "Do-Not-Call Implementation Act," Public Law 108-10, which specifically referenced the Commission's *1992 TCPA Order*, but did nothing to alter the Commission's previous rulings with respect to facsimile advertising

or "Fax").[6] Mattison R. Verdery, the owner of Mattison R. Verdery, C.P.A., P.C., has acknowledged that at the time he received the Facsimile, he and his business had a regular, established business relationship with Staples

Verdery had, on average, approximately 12 separate business transactions with Staples annually.[7] In Verdery's own words, "[p]rior to receiving the Fax," Verdery "had purchased office products and supplies from Staples," and had "applied for Staples' 'Business Rewards' program."[8] "In connection with either making purchases of Staples products or the 'Business Rewards' application, [Verdery] provided Staples with its fax telephone number."[9] Mr. Verdery also has admitted that he never severed the business relationship between Verdery and Staples.[10]

D. Verdery's Suit

On July 23, 2003, Verdery, in its individual capacity and as the purported representative of a class of other customers of Staples, through counsel, filed a suit in the Superior Court of Richmond County, Georgia alleging violation of the TCPA and the Commission's implementing regulations.[11] More specifically, Verdery alleged, *inter alia*,

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[6] The Facsimile is attached as Exhibit B to Verdery's Class Action Complaint for Damages and Injunctive Relief, filed July 23, 2003 (the "Complaint") The Complaint is attached hereto as Exhibit 1

[7] Deposition Tr (attached hereto as Exhibit 2), at p 16 23 to 17 15

[8] Plaintiff's Brief in Support of Motion for Class Certification (attached hereto as Exhibit 3), at p 3 (citations omitted)

[9] *Id*

[10] Deposition Tr (attached hereto as Exhibit 2), at p 16 5 to 16 9 (Q "Prior to receipt of the [Fax] , did you ever at any time ever do anything to sever your relationship with Staples?" A. "No, not that I recall ").

[11] *See* Complaint (attached hereto as Exhibit 1), at p 1 Verdery subsequently sought to certify a class action of all "customers" of Staples who had received facsimile advertisements sent on behalf of Staples in the four years preceding the suit (i e , between July 1999 and July 2003) Amended Class Action Complaint for Declaratory and Injunctive Relief and Damages (attached hereto as Exhibit 4), at ¶¶ 17, 21-31, 44, Plaintiff's Brief in Support of Motion for Class Certification (attached hereto as Exhibit 3), at p 1 Verdery's Amended Complaint withdrew all of the state law claims asserted in the original Complaint

that transmission of the Facsimile "constitutes an 'unsolicited advertisement,' as defined in the TCPA", that Verdery did not "expressly invite[] or g[i]ve Staples and Quick Link permission to send the Fax...."; and that Staples and Quick Link "violated the TCPA, which prohibits the sending of unsolicited facsimile advertisements."[12]

On November 21, 2003, Petitioners moved for summary judgment in Verdery's action on various grounds. Defendants pointed out to the Georgia trial court that applicable rules under the TCPA allowed for facsimiles to be sent to entities with whom the sender had an established business relationship [13]

In its pleadings before the Georgia state trial court, Verdery has directly challenged both the Commission's authority to adopt rules and orders implementing the TCPA, and the validity of the Commission's implementation of the TCPA. Verdery has claimed that "[b]ecause the FCC lacked the authority to establish an exemption to junk fax liability, and because the established business relationship exemption ... is directly contrary to the clear language and intent express [sic] by Congress, this Court should find and declare that no such exemption exists."[14] Verdery has challenged the Commission's *1992 TCPA Order*:

> The FCC is bound by the clear language of the TCPA requiring prior express permission for advertisements to be lawfully sent by fax "Deeming" or "inferring" a relationship to be an invitation or permission is not the same as express invitation or permission. The mere existence of a business relationship, without more, does not satisfy the TCPA's explicit requirement of express invitation or permission.... The plain language of the TCPA's prohibition against junk faxes, combined with the equally clear definition of what is an

[12] Complaint (attached hereto as Exhibit 1), at p 8

[13] Brief of Defendants Staples, Inc and Quick Link Information Services, LLC in Support of Motion for Summary Judgment (attached hereto as Exhibit 5), at pp 16-20, 28-30 The motion was in essence a motion to dismiss and was styled a "Motion for Summary Judgment" solely because the Plaintiff had failed to reference its established business relationship in its initial Complaint

[14] Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment and in Support of Plaintiff's Cross-Motion for Partial Summary Judgment (attached hereto as Exhibit 6), at p 5

> "unsolicited advertisement," requires no interpretation.... [A]ny permission to send junk faxes must be express, not implied.[15]
> * * *
> The established business relationship "exemption" contemplates a broader "safe harbor" for facsimile advertisement than the language enacted by Congress – "express permission." The FCC's action was not a benign attempt to 'clarify' ambiguities or fill conceptual voids in statutory language, it was an improper attempt by the FCC to reinsert an exemption into the TCPA's ban on junk faxing that Congress specifically deleted.[16]

Verdery dismisses the Commission's interpretations of the TCPA's facsimile advertisement provision, as set forth in the *1992 TCPA Order*, the *1995 TCPA Order*, and the *2003 TCPA Order*, as "merely wayward FCC commentary" and "illogical comments" which Verdery has invited the state court to ignore.[17] Verdery's action thus squarely challenges in state court the Commission's rules and orders

After Verdery challenged the validity of the Commission's TCPA Orders, Petitioners informed the court that the Superior Court of Richmond County lacks subject matter jurisdiction to consider the validity of those Commission rules and orders.[18] Petitioners further informed the court that the exclusive method for challenging the Commission's promulgation of rules and orders under the TCPA is by petition to the Commission and then to the appropriate United States Court of Appeals.[19]

Despite its earlier arguments that the Superior Court of Richmond County should "declare [with respect to the Commission's creation of an established business relationship

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[15] *Id* at pp 6-7

[16] *Id* at p 8

[17] *Id* at p 13

[18] Reply Brief of Defendants Staples, Inc and Quick Link Information Services, LLC in Support of Motion for Summary Judgment and in Response to Plaintiff's Cross-Motion for Summary Judgment (attached hereto as Exhibit 7), at p 14

[19] *Id* (citing Sections 402(a) and 405(a) of the Communications Act, the Administrative Orders Review Act, 28 U S C § 2342(1), and various Commission decisions)

defense to the TCPA's prohibition on unsolicited facsimile advertisements] that no such exemption exists," Verdery proceeded to assert, without authority, that Petitioners' subject matter jurisdiction issue was "markedly off-point "[20] Verdery contended that its action was under the TCPA itself and was not affected by Commission rules and orders.[21]

The Superior Court of Richmond County (Judge William Fleming, Jr.) denied the Petitioners' motion to dismiss the case against them without legal analysis,[22] and thereafter refused to grant a certificate of immediate review.[23] Petitioners then sought further relief in the form of an application for injunctive relief and a motion for a stay on the basis of lack of subject matter jurisdiction. At the April 27, 2004 hearing, the court denied Petitioners' application for a temporary restraining order, and refused to provide any relief prior to the accrual of class discovery obligations.[24] Immediate review was likewise denied.[25]

III. ARGUMENT

A. The Commission Should Rule That Verdery's Challenge to the Validity of Commission Orders and Rules Lies With an Appropriate Federal Court of Appeals

Federal law explicitly requires any person aggrieved by a Commission order to follow proper federal administrative procedures to challenge such Orders. 47 U.S.C. §§ 402(a), 405(a); 28 U.S.C. § 2342(1). The Commission should find and declare that Verdery

[20] Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment and in Support of Plaintiff's Cross-Motion for Partial Summary Judgment (attached hereto as Exhibit 6), at p. 5.

[21] Plaintiff's Brief in Reply to Defendants' Responses to Plaintiff's Cross-Motion for Summary Judgment (attached hereto as Exhibit 8), at p 2

[22] Order, March 24, 2004 (attached hereto as Exhibit 9)

[23] Transcript of Hearing on Application for Temporary Restraining Order, April 27, 2004 (attached hereto as Exhibit 10), at pp 31-32

[24] *Id* at pp 44-47

[25] *Id*

has failed to follow such requirements, and consequently has violated applicable law by collaterally attacking Commission decisions in state court.

Section 402(a) of the Communications Act provides for exclusive review of Commission orders under the Administrative Orders Review Act, 28 U.S.C. § 2342.

> Any proceeding to enjoin, set aside, annul or suspend any order of the Commission under this Act .. shall be brought as provided by and in the manner prescribed in chapter 158 of title 28, United States Code [28 U.S.C. § 2341, et seq].

47 U.S.C. § 402(a) The Administrative Orders Review Act, 28 U.S.C. § 2342, confirms that the federal Courts of Appeals have exclusive jurisdiction over such challenges:

> The court of appeals ... has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of –
>
> (1) all final orders of the Federal Communications Commission made reviewable by [Section] 402(a) of Title 47[.]

Additionally, Section 405(a) of the Communications Act requires that Verdery have petitioned the Commission in the first instance:

> After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 5(c)(1) [47 USCS § 155(c)(1)], any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order....

47 U.S.C § 405(a).

The United States Supreme Court has made clear that "[e]xclusive jurisdiction for review of final FCC orders .. lies in the Court of Appeals. Litigants may not evade these provisions by requesting the District Court to enjoin action that is the outcome of the agency's order." *FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 468 (104 S.Ct.

1936) (1984) (citing *Port of Boston Marine Terminal Ass'n. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 69 (91 S Ct. 203) (1970))

Port of Boston, decided 34 years ago, held that parties may not seek "collateral redetermination" of issues already decided by agencies in suits between private litigants. 400 U.S. at 72 ("[Appellant] cannot force collateral redetermination of the same issue [previously determined by the agency] in a different and inappropriate forum."). In that case, certain shippers challenged, in an action between private litigants, the orders of the Federal Maritime Commission (an agency which, like this Commission, is subject to the Administrative Orders Review Act) interpreting relevant law to allow a tariff to be charged without prior approval of the Commission. *Id* at 65 When the issue of the validity of the agency's orders was raised in the proceeding, the Court held that the District Court had properly refused to consider the validity of the Commission orders. 400 U.S. at 69 ("The District Court also concluded correctly that it was without authority to review the merits of the Commission's decision.")

These procedures for obtaining judicial review of Commission orders decidedly apply to this Commission's *1992 TCPA Order*, *1995 TCPA Order*, *2003 TCPA Order*, and *2003 TCPA Order on Reconsideration*. "Exclusive jurisdiction over final FCC orders lies within the courts of appeals." *See Louisiana Public Svc Commission v. FCC*, 476 U.S. 355, 361-63 (106 S.Ct. 1890) (1986) (citing 28 U.S C. § 2342(1), the Supreme Court held that the Court of Appeals had exclusive jurisdiction to review the Commission's Memorandum Opinion and Order and Order granting reconsideration at issue in that case).

The Commission's TCPA Orders are binding upon Verdery, as are the requirements of the Communications Act that Verdery seek appellate review in the appropriate federal

Court of Appeals. As the Eighth Circuit held in *Southwestern Bell Tel Co v Arkansas Public Svc. Commission*:

> FCC orders become effective upon issuance unless stayed by the FCC or a reviewing court. 47 U.S.C. § 408 (1976). The FCC is not required to seek enforcement of its orders before they become effective... The district court had no jurisdiction to deny enforcement of the FCC order on the basis that it was ultra vires.

738 F.2d 901, 907 (8th Cir 1984) (citation omitted). *See also Consolidated Telephone Cooperative v. Western Wireless Corp* , 637 N.W.2d 699, 707 (N.D. 2001) ("[W]e are not at liberty to review the FCC's statutory interpretation even if we doubted its soundness, and must apply the rulings and regulations as written. Because the FCC's regulations and rulings are not subject to 'collateral attacks,' *whether the FCC has exceeded the authority granted by Congress* in promulgating 47 C.F.R. 22.99 and in its interpretative rulings and orders *is a question [the state public service commission] and this Court have no jurisdiction to consider.*") (citations omitted) (emphasis added); *Dickinson v Cosmos Broadcasting Co., Inc* , 782 So. 2d 260, 268 (Ala. 2000) ("This Court cannot entertain a collateral challenge to the validity of the 1991 FCC Declaratory Order, nor can Alabama Courts provide a forum in which the [plaintiffs] can attack the order."); *Alsar Technology, Inc. v. Zoning Bd. of Adjustment of Nutley*, 563 A.2d 83, 91 (N.J Super. Ct. 1989) ("[T]his Court lacks jurisdiction to consider or decide a challenge to the validity of the FCC preemptive regulation or the authority of the FCC to enact the regulation."), *Mainstream Mktg. Servs. v. FTC*, 358 F 3d 1228, 1236 (10th Cir. 2004) (challenge to "established business relationship" defense created by FCC in another portion of TCPA subject to exclusive review by federal court of appeals: "[W]e review the FCC order directly pursuant to 47 U.S.C. § 402(a) and 28 U.S C. § 2342 . . We review whether the FCC's decision to include an established business

relationship exception violated the Administrative Procedure Act under the arbitrary and capricious standard.")

The TCPA, being a general grant of jurisdiction (47 U.S.C. § 227(b)(3)), provides no shelter for Verdery from the specific grant of exclusive jurisdiction to the federal Courts of Appeals. *Southwestern Bell*, 738 F.2d at 906 (holding that exclusive jurisdiction of Court of Appeals trumps general jurisdiction of District Court over cause of action: "We reject the argument that the district court possessed ancillary jurisdiction.... It is well established that where a statute specifically provides for exclusive jurisdiction in one court, as 28 U.S.C § 2342 does, the specific grant of jurisdiction takes precedence over a general grant of jurisdiction."), *Carpenter v. Department of Transp.*, 13 F.3d 313, 316 (9th Cir. 1994) (private right of action did not defeat exclusive jurisdiction under Administrative Orders Review Act), *Brown v General Servs Admin* , 425 U.S. 820, 833-34 (96 S. Ct. 1961) (1976) ("[A] precisely drawn, detailed statute pre-empts more general remedies ").

Because Verdery cannot dispute that it had a business relationship with Staples prior to, and as of, March 18, 2003, the date it received the Facsimile, it instead attempts to question in state court the authority of the Commission.[26] Verdery directly attacks the Commission's authority and the validity of its rules and orders implementing the TCPA – asserting that the Commission's determination in the *1992 TCPA Order,* subsequently affirmed on numerous occasions, that the existence of an established business relationship establishes consent to receive facsimile advertisement transmissions,[27] was "improper" and

[26] Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment and in Support of Plaintiff's Cross-Motion for Partial Summary Judgment, (attached hereto as Exhibit 6), at pp. 4-17

[27] *1992 TCPA Order*, 7 FCC Rcd at 8779, n 87, *1995 TCPA Order*, 10 FCC Rcd at 12408, ¶ 37, *2003 TCPA Order on Reconsideration*, 18 FCC Rcd at 16975, ¶ 6 & n 24

that "no rational basis or grant of authority . . justifies" the Commission's TCPA Orders.[28] The Commission must rule that these challenges may only be made in an appropriate federal Court of Appeals.

B. The Commission Should Confirm Its TCPA Orders and Rules in Effect as of March 18, 2003

In addition to being procedurally improper, Verdery's challenges to the Commission's rules and orders are a thinly disguised attempt to make ambiguous what the Commission clearly stated in 1992 and on numerous occasions thereafter: that an established business relationship establishes consent to receive facsimile advertisements.

In the face of the Commission's clear pronouncements, Verdery has informed the Georgia trial court that in 1992 the Commission "sent conflicting signals about the TCPA's prohibition on junk faxing."[29] Verdery believes, or in any event asserts, that the Commission's statement that "the TCPA leaves the Commission without discretion to create exemptions from or limit the effects of the prohibition" on unsolicited facsimiles, is inconsistent with the very next sentence in the *1992 TCPA Order*, which states that "facsimile transmission[s] from persons or entities who have an established business relationship with the recipient can be deemed to be invited or permitted by the recipient."[30] No inconsistency or ambiguity exists The Commission followed its mandate from Congress to "prescribe regulations to implement the requirements of" the TCPA. In so doing, the Commission found that the TCPA's prohibition on sending an "unsolicited advertisement" to a facsimile machine would not be violated when sender and recipient have an established

[28] Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment and in Support of Plaintiff's Cross-Motion for Partial Summary Judgment (attached hereto as Exhibit 6), at p 8.

[29] *Id* at p 5

[30] *Id* (quoting *1992 TCPA Order*, 7 FCC Rcd at 8779 n 87)

business relationship. Simply put, for purposes of the TCPA, an established business relationship would serve as evidence that the advertisement was transmitted with the recipient's "prior express invitation or permission." The Commission – just as it stated in the *1992 TCPA Order* – did not create an "exemption". It simply explained the meaning of "unsolicited advertisement" and "prior express invitation or permission," as Congress intended for it to do.

Recent changes to the Commission's facsimile advertisement rules – which, although adopted, have not yet taken effect – further establish that the ambiguity claimed by Verdery is a fiction. In the *2003 TCPA Order*, the Commission

> reverse[d] [its] prior conclusion that an established business relationship provides companies with the necessary express permission to send faxes to their customers. As of the effective date of these rules, the EBR will no longer be sufficient to show that an individual or business has given their express permission to receive unsolicited facsimile advertisements.

2003 TCPA Order, FCC 03-153, at ¶ 189. The Commission revised its rules to require businesses to obtain their customers' signed, written consent before transmitting faxes to them *Id* Thus, the Commission explicitly announced a change in prior law. Equally clearly, the Commission "emphasized that, prior to the effectuation of" the new rules, "companies that transmitted facsimile advertisements to customers with whom they had established business relationships *were in compliance with the Commission's existing rules*." *Id* at n.699 (emphasis added).

Because Commission rules and orders in effect at the time of the transmission of the Facsimile by Petitioners to Verdery unequivocally provided that an established business relationship between the sender and the recipient of a facsimile advertisement constituted

"prior express invitation or permission" to receive such a facsimile,[31] and because Verdery plainly has informed the Superior Court of Richmond County, Georgia to the contrary, a ruling by the Commission affirming the applicable law as of March 18, 2003 is requested. Petitioners also request the Commission to affirm that until the Commission's revised TCPA rules become effective on January 1, 2005, an established business relationship will continue to be sufficient to show that an individual or business has given prior express invitation or permission to receive facsimile advertisements.[32]

C. The Commission Should Rule That Petitioners Did Not Violate the TCPA or the Commission's Rules and Orders

There is no dispute over whether, prior to and as of Verdery's receipt of the Facsimile, Verdery had established a business relationship with Staples: Mr. Verdery has admitted that such a relationship existed based on his frequent business transactions with Staples and his active participation in Staples' "Business Rewards" program, and he has conceded that he never severed that relationship.[33] Also, Verdery has acknowledged that in the course of its relationship with Staples, it provided Staples with Verdery's facsimile number [34]

These facts demonstrate conclusively that Petitioners did not violate the TCPA or applicable Commission rules and orders in causing the transmission of the Facsimile to

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[31] *1992 TCPA R&O*, 7 FCC Rcd at 8779, ¶¶ 34, 54, n 87, *1995 TCPA Order*, 10 FCC Rcd at 12408, ¶ 37 *See also 2003 TCPA Order*, FCC 03-153, ¶¶ 189, 191, *2003 TCPA Order on Reconsideration*, 18 FCC Rcd at 16975, n 24

[32] *2003 TCPA Order on Reconsideration*, 18 FCC Rcd at 16975, ¶6.

[33] Deposition Tr (attached hereto as Exhibit 2), at pp 16 5 to 16 9, 16 23 to 17.15; Plaintiff's Brief in Support of Motion for Class Certification (attached hereto as Exhibit 3), at p 3 (citations omitted).

[34] *See* Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment and in Support of Plaintiff's Cross-Motion for Partial Summary Judgment (attached hereto as Exhibit 6), at p 3 (internal citations omitted)

Verdery, Staples' existing customer. Petitioners request simply that the Commission rule that, with respect to Verdery, they did not violate the TCPA or the Commission's rules and orders in effect at the time of transmission of the Facsimile.

D. The Commission Should Issue a Cease and Desist Order Enjoining Verdery From Continuing Its State Court TCPA Action

The Commission is empowered by Section 47 U.S.C. § 312(b) to issue orders to cease and desist from violations of the Communications Act. Verdery's attempt to seek relief from and nullify valid Commission Orders and rules in the state courts constitutes just such a violation Section 402(a) of the Communications Act provides that "*[a]ny proceeding* to enjoin, set aside, annul, or suspend any order of the Commission under this Act ... shall be brought as provided by and in the manner prescribed by" the Hobbs Act. 47 U.S.C. § 402(a) (emphasis added). The Communications Act also requires that, "[a]fter an order, decision, report, or action has been made or taken in any proceeding by the Commission ... any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action." 47 U.S.C. § 405(a). At no time did Verdery ask the Commission to reconsider its TCPA rules and orders pursuant to Section 405(a). Nor has Verdery followed the clear requirement that challenges to the validity of FCC rules and orders must be brought in a federal Court of Appeals

The Supreme Court has ruled that federal agencies may order the "cessation of a state court lawsuit" in vindication of federal interests when such lawsuit is merely a sham lawsuit in derogation of those federal interests. The Court has allowed such relief in the context of both labor relations and antitrust In *Bill Johnson's Rests v NLRB*, the Supreme Court held:

> Just as false statements are not immunized by the First Amendment right to freedom of speech, . baseless litigation is not immunized by the First Amendment right to petition. .. Similarly, the state interests recognized in the Farmer line of cases do not enter into play when the state-court suit has no basis Since, by definition, the plaintiff in a baseless suit has not suffered a legally protected injury, the State's interest "in protecting the health and well-being of its citizens," Farmer, supra, at 303, is not implicated. States have only a negligible interest, if any, in having insubstantial claims adjudicated by their courts, particularly in the face of the strong federal interest in vindicating the rights protected by the national labor laws.

461 U.S. 731, 743-44 (103 S. Ct. 2161) (1983) (citations omitted).

A lawsuit having the sole and explicit purposes of undermining the Commission's authority under the TCPA and the Communications Act, overturning the Commission's Orders under the TCPA, inviting a state court without subject matter jurisdiction to sanction invasion of the records of Petitioners through voluminous "class discovery," encouraging such court to impose massive, retroactive liability for conduct that was lawful at all relevant times, and eroding the ability of businesses to rely on the Orders of the Commission, is a sham lawsuit If the exercise of the authority to cease state court litigation has ever been warranted in the federal system, this is such a case.

IV. EXPEDITED RELIEF IS NECESSARY UNDER THE CIRCUMSTANCES

Petitioners seek relief only after denial of their motion to dismiss based on lack of subject matter jurisdiction, and denial of the right of appeal in state court.[35] Petitioners seek expedited relief to avoid extensive class discovery obligations that have been imposed by the trial court and which are set to be effective, at earliest, on May 10, 2004.

[35] Although Petitioners show their diligence in addressing these issues in state court, Petitioners were not required to exhaust remedies in state court, rather, it was Verdery which was required to exhaust remedies with the Commission 47 U S C §§ 402(a), 405(a)

Staples estimates the damages sought in the Verdery suit are between $2.2 and $6.7 billion, based on the class sought by Verdery – a *national* class of all persons to whom Staples facsimile advertisements were sent in the four-year period covered by the Complaint. The denial of Petitioners' motions and of their requests for interlocutory appellate review essentially means that Petitioners will have to suffer the entry of a $2 2 to $6.7 billion judgment *before* having a further opportunity to seek meaningful appellate review.[36] In the interim, the Superior Court of Richmond County has ordered Staples and Quick Link to comply with voluminous class discovery demanded by Verdery's counsel and to produce persons for depositions relative to such class discovery.[37] Under the discovery order entered in the case, Petitioners will be required to reveal confidential information pertaining to their business affairs and their customers, and Verdery will be allowed to depose Staples corporate representatives at the expense of Staples. May 10, 2004 is the date on which Verdery has promised to commence "class discovery." Because the discovery obligations would become effective immediately upon a ruling on the Motion for Reconsideration, which can, at the earliest, be decided on May 10, 2004, Petitioners file this request for relief in order to assure that discovery obligations do not accrue prior to Commission consideration of this matter and render this controversy moot, in whole or in part

In the absence of the requested relief, Verdery's state court class action claims based on the TCPA will proceed to a multi-billion-dollar judgment notwithstanding Petitioners'

[36] *See* Official Code of Georgia §§ 5-6-34(a)(1), (b) (final judgments terminating the case are subject to direct appeal, but where trial judge denies a motion to dismiss the case or for summary judgment, appeal requires a certificate of immediate review from the trial judge) Even if appellate review had been allowed, by separately requesting permission to do so from the trial court and the Court of Appeals, it would not necessarily bar the trial court from conducting a trial and rendering a judgment for the billions of dollars sought by Verdery *Fairburn Banking Co v Gafford*, 263 Ga 792, 794 (439 S E 2d 482) (1994) ("[W]hile a trial court is without jurisdiction to modify or enforce a judgment during the period of supersedeas, it has jurisdiction to consider other matters in the case and even to conduct a trial, subject to the peril that a decision which conflicts with that of the appellate court will be made nugatory ")

good-faith reliance on and compliance with this Commission's rulings. Staples is being held hostage in state court litigation in which the plaintiffs are seeking excessive and unjustified damages.

The continued prosecution by Verdery of its state court action improperly challenging the Commission's rules and orders implementing the TCPA not only harms Staples and Quick Link, but also diminishes the binding effect of the Commission's Orders and the oversight of the federal Courts of Appeals, and undermines the time which the Commission has given the business community to comply with the new facsimile advertising requirement of a signed writing evidencing consent. The Commission's *2003 TCPA Order* and *2003 TCPA Order on Reconsideration*, in which it recognized "the need to allow affected entities time to comply with the new faxing rules," 18 FCC Rcd at 16972, n.27, have effectively been nullified

Petitioners also are immediately and irreparably harmed in that First Amendment commercial speech rights, protected by the TCPA and applicable Commission rules, have been and continue to be chilled by the ongoing prosecution of Verdery's action. At the very least, pursuant to 47 U.S.C. § 312(b), the Commission should expeditiously issue a cease and desist order that preserves the *status quo* between the parties and avoids the imposition of a massive, financially crippling judgment in a state court suit over the validity of this Commission's rules and orders.

[37] Order Compelling Discovery, April 5, 2004 (attached hereto as Exhibit 11)

V. CONCLUSION

Verdery's continued prosecution of its state court action against Petitioners clearly violates the requirements for seeking review of agency action set forth in the Communications Act and the Hobbs Act In order to avoid the unjust result of the Petitioners suffering a massive, financially crippling multi-billion-dollar judgment, the Commission should immediately exercise its authority pursuant to Section 554(e) of the Administrative Procedure Act, Section 1.2 of its rules, and Section 312(b) of the Communications Act, terminate the controversy between Verdery, on the one hand, and Staples and Quick Link, on the other, and resolve the uncertainty asserted by Verdery. The Commission also should order Verdery to cease and desist from further prosecution of its action against Petitioners until Verdery has followed the mandates of federal law for seeking review of this Commission's rules and orders.

Respectfully submitted,

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